## SRI RIMBA MENTARI DEVELOPMENT SDN BHD v. SOUTHEAST ASIA SPECIAL ASSET MANAGEMENT BHD (SEASAM)

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEAL NO: B-02(A)-918-05-2017]
25 OCTOBER 2018

***LAND LAW:*** *Order for sale – Assigned property – Seeking for order for judicial sale – Limitation – Cause of action – Accrual of – Whether 12 year limitation period runs from date when right to receive money accrued or from date of default of 16D notice issued – Whether exercise of right of sale of property barred under s. 21(1) of Limitation Act 1953 – Whether limitation already set in – Whether granting sale which was time-barred amounted to 'cause to the contrary' within s. 256(3) of National Land Code*

***LIMITATION:*** *Accrual of cause of action – Order for sale – Assigned property – Seeking for order for judicial sale – Whether 12 year limitation period runs from date when right to receive money accrued or from date of default of 16D notice issued – Whether exercise of right of sale of property barred under s. 21(1) of Limitation Act 1953 – Whether limitation already set in – Whether granting sale which was time-barred amounted to 'cause to the contrary' within s. 256(3) of National Land Code*

The respondent granted overdraft and term loan facilities amounting to RM220,000 to the appellant *vide* a facility agreement ('the CHSL facility') to part finance the purchase of an office ('the property'). As the property was held under a master title at the material time of the letter of offer, the appellant agreed to the execution of an assignment pending issuance of the individual or strata title. A first party charge over the appellant's property was then created in favour of the respondent and the appellant thus occupied the property as a licensee. In breach of the terms of the letter of offer, the facility agreement and the charge, the appellant defaulted in its payments. Consequently, the respondent proceeded to enforce its rights. On 16 March 1998, the respondent issued a letter of demand for payment of the outstanding sum under the facilities. On 21 May 1998, the respondent issued a letter recalling the loan or facilities and advising the appellant that it would be exercising its right to sell the assigned property by public auction. The respondent then filed *in personam* civil proceedings at the Sessions Court. Whilst the *in personam* proceedings were underway, the respondent also commenced an *ad rem* action towards exercising its right of sale of the assigned property. A public auction was fixed on 6 November 2006. The

auction, however, did not take place because the appellant obtained an *ex parte* injunction. On 6 December 2010, the respondent filed an application under O.14A of the Rules of the High Court 1980. On 9 March 2011, the court gave the respondent leave to dispose of the property through an auction conducted under the National Land Code ('the 2011 order'). The respondent then issued a Form 16D notice under s. 256 of the National Land Code. The appellant did not respond to the notice; neither did the appellant settle the outstanding amount. On 18 October 2016, the respondent filed its originating summons seeking an order for a judicial sale. The appellant objected to the application and submitted, *inter alia*, that the application was time barred by virtue of s. 21(1) of the Limitation Act 1953 ('the Limitation Act'). The judge granted the order for sale after finding that there was no cause to the contrary established by the appellant. Hence, this appeal. The appellant's main bone of contention rested with the issue of limitation. According to the appellant, s. 21(1) of the Limitation Act barred the recovery action of the respondent; that the action *in rem* to sell the property arose more than 18 years ago, on 21 May 1998. The fact that the respondent had initiated an auction of the property on 6 November 2006 was acknowledgment that the cause of action had already arisen at that time. In response, the respondent focused on the 2011 order, that until that order, the respondent was not able to sell the property. However, with the 2011 order, the respondent issued the 16D notice. When the appellant failed to remedy within 14 days from the service of the notice, time under s. 21(1) of the Limitation Act began. According to the respondent, since the application for a judicial sale was filed in 2016, the application was clearly filed in time and there was therefore no cause to the contrary shown by the appellant. Two questions also arose for consideration (i) whether by virtue of the various actions of the appellant and the orders granted by the court, was the computation of the 12 year limitation period in any way affected or has the period of limitation been postponed or suspended; and (ii) whether the fact that the subject property of the appellant was held under a master title as opposed to an individual or strata title until 2009, had any bearing whatsoever on the construction of s. 21 of the Limitation Act and thereby the respondent's right to approach the court for a judicial sale.

**Held (allowing appeal with costs)**
**Per Mary Lim JCA delivering the judgment of the court:**

**(1)** The 12 year limitation period under s. 21(1) of the Limitation Act runs from the date when the right to receive the money accrued, and not from the date of default of the 16D Notice issued under s. 256 of the National Land Code. The date when the right to receive the money accrued would be the date of breach of the charge or underlying agreement. The respondent's right to sell the charged property arose when it recalled the loans after the appellant defaulted in its repayments, thereby terminating the facilities granted under the facility agreement *cum* deed of assignment

agreement. Thus, the respondent's right to receive the money accrued when the appellant was in default and that would be 21 May 1998. At that date, there was clearly in existence a person who can sue and another who can be sued. The existence of a cause of action was implicitly acknowledged by the respondents in their solicitors' letter dated 21 May 1998 and by the respondent's own actions in recalling the facilities and exercising its right to sell the assigned property by way of a public auction. The limitation period of 12 years under s. 21(1) would have therefore set in on 20 May 2010. (paras 22-37)

**(2)** The period of limitation was not postponed or suspended by reason of the actions of the appellant or the orders granted by the court. The terms of s. 21 in the Limitation Act do not envisage such postponement or suspension. It was incumbent on the respondent, as a vigilant litigant, to take active and necessary steps in order to secure for itself the right to diligently proceed to prosecute its claim and seek an order for judicial sale, more so when the period of limitation was expiring. As it is, it was not until 6 December 2010 that the respondent approach the court for an order under O. 14A which was granted on 9 March 2011. By this time, limitation had already set it. It had set in almost six months earlier, on 20 May 2010. It was not available to the respondent to use the orders of court for its own inactivity and indolence. Procuring the order of court for a judicial sale on 20 April 2017 did not alter the fact that the order was invalid by reason of time bar, giving rise to real contrary reasons why the order for sale ought not to have been granted by the High Court. It was patently clear that the respondent had taken its time to realising the security. Even after the 2011 order, it was not until 2016 that the respondent proceeded to seek an order for sale. (paras 41-46)

**(3)** The status of the title to the charged property did not affect the right of the respondent to apply for an order for sale. The respondent always knew the nature of the title in the property that it was held under a master title and had thus agreed to a security in the form of an assignment, And it was pursuant to the assignment that the respondent exercised its right to the sale of the assigned property. Section 21(1) further makes no distinction on the character or nature of the title; whether it be master, individual, strata, final or qualified; it only makes reference to the security being in the form of either a mortgage or 'other charge on land.' Hence, where the exercise of the right of sale of the property was barred under s. 21(1) of the Limitation Act, the grant of sale by the judge was indeed, contrary to 'some rule of law or equity.' The appellant had shown that granting a sale which was time barred amounted to 'cause to the contrary' within s. 256(3) of the National Land Code. (paras 49-52)

***Bahasa Malaysia*** *Headnotes*

Responden memberikan kemudahan overdraf dan pinjaman berjangka berjumlah RM220,000 kepada perayu melalui perjanjian kemudahan ('kemudahan CHSL') untuk pembiayaan sebahagian pembelian sebuah pejabat ('hartanah'). Oleh kerana hartanah itu dipegang bawah hak milik induk pada waktu material surat tawaran, perayu bersetuju untuk pelaksanaan surat ikatan penyerahhakan sementara menunggu pengeluaran hak milik individu atau strata. Gadaian pihak pertama atas hartanah perayu kemudiannya diwujudkan memihak pada responden dan perayu oleh itu menduduki hartanah tersebut sebagai pemegang lesen. Perayu telah gagal membuat pembayaran dan melanggar syarat-syarat surat tawaran, perjanjian kemudahan dan gadaian. Akibatnya, responden terus menguatkuasakan haknya. Pada 16 Mac 1998, responden mengeluarkan surat permintaan untuk bayaran jumlah yang belum dijelaskan bawah kemudahan. Pada 21 Mei 1998, responden mengeluarkan surat memanggil semula pinjaman atau kemudahan dan menasihati perayu bahawa ia akan melaksanakan haknya untuk menjual hartanah yang diserahhakan itu melalui lelongan awam. Responden kemudiannya memfailkan prosiding sivil *in personam* di Mahkamah Sesyen. Sementara prosiding *in personam* dalam proses, responden juga memulakan tindakan *ad rem* ke arah melaksanakan hak jualan hartanah yang diserahhakan. Satu lelongan awam telah ditetapkan pada 6 November 2006. Walau bagaimanapun, lelongan tidak dijalankan kerana perayu memperoleh satu injunksi *ex parte*. Pada 6 Disember 2010, responden memfailkan permohonan bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980. Pada 9 Mac 2011, mahkamah memberikan kebenaran kepada responden untuk melupuskan hartanah itu melalui lelongan yang dikendalikan bawah Kanun Tanah Negara ('perintah 2011'). Responden kemudiannya mengeluarkan notis Borang 16D bawah s. 256 Kanun Tanah Negara. Perayu tidak membalas notis; dan perayu juga tidak melangsaikan jumlah yang belum dijelaskan. Pada 18 Oktober 2016, responden memfailkan saman pemula menuntut perintah jualan kehakiman. Perayu membantah permohonan dan menghujahkan, antara lain, bahawa permohonan dihalang oleh had masa bawah s. 21(1) Akta Had Masa 1953 ('Akta Had Masa'). Hakim membenarkan perintah jualan selepas mendapati bahawa tiada sebab bertentangan yang dibuktikan oleh perayu. Oleh itu, rayuan ini. Alasan utama hujahan perayu adalah berkenaan isu had masa. Menurut perayu, s. 21(1) Akta Had Masa menghalang tindakan pemulihan responden; bahawa tindakan *in rem* untuk menjual hartanah timbul lebih daripada 18 tahun lepas, pada 21 Mei 1998. Fakta bahawa responden memulakan lelongan hartanah pada 6 November 2006 adalah perakuan bahawa satu kausa tindakan telah timbul pada masa itu. Sebagai balasan, responden menumpukan perhatian pada perintah 2011, bahawa sehingga perintah itu, responden tidak dapat menjual hartanah. Walau bagaimanapun,

dengan perintah 2011, responden mengeluarkan Notis 16D. Apabila perayu gagal meremedikan dalam tempoh 14 hari dari penyerahan notis, masa bawah s. 21(1) Akta Had Masa bermula. Menurut responden, oleh kerana permohonan jualan kehakiman difailkan pada 2016, permohonan jelas difailkan dalam tempoh yang dibenarkan dan dengan itu, tiada sebab bertentangan yang ditunjukkan oleh perayu. Dua soalan timbul untuk pertimbangan (i) sama ada melalui beberapa tindakan perayu dan perintah-perintah yang diberikan mahkamah, adakah pengiraan 12 tahun tempoh had masa terjejas atau adakah tempoh had masa ditangguhkan atau digantung; dan (ii) sama ada fakta bahawa hartanah perayu dipegang bawah hak milik induk dan bukan hak milik individu atau strata sehingga 2009, mempunyai apa-apa pengaruh atas tafsiran s. 21 Akta Had Masa dan dengan itu hak responden untuk ke mahkamah bagi mendapatkan jualan kehakiman

**Diputuskan (membenarkan rayuan dengan kos)**
**Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:**

**(1)** Tempoh had masa 12 tahun bawah s. 21(1) Akta Had Masa bermula dari tarikh hak untuk mendapatkan wang terakru, dan bukan daripada tarikh keingkaran Notis 16D bawah s. 256 Kanun Tanah Negara. Tarikh apabila hak untuk mendapatkan wang terakru adalah tarikh pelanggaran gadaian atau perjanjian asal. Hak responden untuk menjual hartanah yang digadaikan itu timbul apabila responden memanggil semula pinjaman selepas perayu gagal membuat bayaran, dengan itu menamatkan perkhidmatan yang diberikan bawah perjanjian kemudahan merangkap perjanjian surat ikatan penyerahan hak. Oleh itu, hak responden untuk menerima wang terakru apabila perayu dalam keingkaran dan itu adalah pada 21 Mei 1998. Pada tarikh itu, jelas wujud seorang yang boleh menyaman dan seorang yang boleh disaman. Kewujudan kausa tindakan secara tersirat diakui oleh responden-responden dalam surat peguam mereka bertarikh 21 Mei 1998 dan melalui tindakan-tindakan responden sendiri dalam memanggil balik kemudahan-kemudahan dan melaksanakan haknya untuk menjual hartanah yang diserahhakan melalui lelongan awam. Had masa 12 tahun bawah s. 21(1) dengan itu telah bermula pada 20 Mei 2010.

**(2)** Tempoh had masa tidak ditangguh atau digantung oleh alasan tindakan-tindakan perayu atau perintah-perintah yang diberi oleh mahkamah. Syarat-syarat s. 21 dalam Akta Had Masa tidak membayangkan penangguhan atau pergantungan. Wajib untuk responden, sebagai pendakwa berwaspada, untuk mengambil langkah-langkah yang aktif dan perlu untuk mendapatkan untuk diri sendiri hak untuk dengan tekun meneruskan dengan dakwaan permohonannya dan menuntut perintah jualan kehakiman, lebih-lebih lagi apabila tempoh had masa akan luput. Hanya pada 6 Disember 2010 barulah responden ke mahkamah untuk

perintah bawah A. 14A yang dibenarkan pada 9 Mac 2011. Pada masa ini, had masa telah bermula. Ini telah bermula enam bulan lebih awal, pada 20 Mei 2010. Tidak tersedia untuk responden menggunakan perintah-perintah mahkamah sebagai alasan untuk ketidakaktifan dan kemalasannya sendiri. Memperolehi perintah mahkamah untuk jualan kehakiman pada 20 April 2017 tidak mengubah fakta bahawa perintah adalah tidak sah kerana dilarang oleh had masa, menimbulkan sebab bertentangan mengapa perintah jualan tidak sepatutnya dibenarkan oleh Mahkamah Tinggi. Amat jelas bahawa responden telah mengambil masa untuk mendapatkan sekuriti. Biarpun selepas perintah 2011, responden hanya meneruskan dengan tuntutan perintah jualan pada tahun 2016.

**(3)** Status hak milik hartanah yang digadaikan tidak menjejaskan hak responden untuk memohon perintah jualan. Responden sentiasa tahu sifat hak milik hartanah bahawa ia dipegang bawah hak milik induk dan telah bersetuju dengan sekuriti dalam bentuk penyerahhakan. Dan adalah mengikuti penyerahhakan responden melaksanakan haknya untuk jualan hartanah yang diserahhakan. Seksyen 21(1) tidak membuat apa-apa perbezaan atas karakter atau sifat hak milik; sama ada induk, individu, strata, muktamad atau berkelayakan; seksyen ini hanya membuat rujukan pada sekuriti dalam bentuk gadai janji atau 'gadaian lain atas tanah.' Oleh itu, apabila pelaksanaan hak jualan hartanah dilarang bawah s. 21(1) Akta Had Masa, kebenaran jualan oleh hakim adalah bertentangan dengan 'kedaulatan undang-undang atau ekuiti.' Perayu telah menunjukkan bahawa membenarkan jualan yang dilarang oleh had masa berjumlah 'sebab bertentangan' dalam tempoh s. 256(3) Kanun Tanah Negara.

**Case(s) referred to:**

*Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC* ***(refd)***

*Jigarlal K Doshi v. Resolution Alliance Sdn Bhd & Another Appeal [2012] 1 LNS 811 CA* ***(not foll)***

*Lim Ban Hooi & Anor v. Malayan Banking Bhd [2018] 6 CLJ 545 CA* ***(foll)***

*Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC* ***(refd)***

*Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286 FC* ***(refd)***

*Nasri v. Mesah [1970] 1 LNS 85 FC* ***(refd)***

*Peh Lai Huat v. MBF Finance Bhd [2009] 5 CLJ 69 CA* ***(refd)***

*Sivadevi Sivalingam v. CIMB Bank Bhd [2018] 1 LNS 511 CA* ***(foll)***

*Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC* ***(refd)***

*Wan Zubaidah Wan Mahmood & Anor v. CIMB Bank Bhd [2018] 1 LNS 768 CA* ***(foll)***

**Legislation referred to:**

Limitation Act 1953, ss. 6, 21(1), (2)

National Land Code, s. 256(3)

Rules of the High Court 1980, O. 14A

*For the appellant - WP Leong; M/s WP Leong & Partners*
*For the respondent - Gurmeet Kaur; M/s Shaikh David & Co*

*[Editor's note: For the High Court judgment, please see Southeast Asia Special Asset Management Berhad lwn. Sri Rimba Mentari Development Sdn Bhd [2017] 1 LNS 1869 (overruled).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Mary Lim JCA:**

**[1]** This is an appeal against the decision of the High Court allowing the respondent's application for a judicial sale of land belonging to the appellant.

**[2]** These are the underlying facts. The respondent granted overdraft and term loan facilities amounting to RM220,000 to the appellant *vide* facility agreement, more particularly described as an "agreement for choice shop-house loan" or "the CSHL Facility" (without title) dated 5 September 1997. The CSHL Facility was to part finance the purchase of an office unit located in Mukim Sungai Buloh, Daerah Petaling (the property), developed by Cahaya Kota Development Sdn Bhd.

**[3]** As the property was held under a master title at the material time of the letter of offer dated 11 April 1997, the appellant agreed to the execution of an assignment pending issuance of the individual or strata title - see s. 5.1 of the agreement. This assignment was in fact effected *vide* the facility agreement cum deed of assignment agreement dated 5 September 1997 - see pp. 126 to 167 of the record of appeal. Sections 2.02, 2.03 and 3.01 of the assignment acknowledge that under the deed of assignment, the appellant had absolutely assigned to the respondent all its rights and title to and interest whatsoever in the property as security for the indebtedness - see p. 219 of the record of appeal. Cahaya Kota Development Sdn Bhd had also given its consent to the assignment - see p. 231. A first party charge over the appellant's property was then created in favour of the respondent. With this arrangement, the appellant thus occupied the property as a licensee.

**[4]** In breach of the terms of the letter of offer, the facility agreement and the charge, the appellant defaulted in its repayments. Consequently, the respondent proceeded to enforce its rights.

**[5]** On 16 March 1998, the respondent issued a letter of demand for payment of the outstanding sum under the facilities - see p. 253 of the record of appeal. On 21 May 1998, the respondent issued a letter recalling the loan or facilities and advising the appellant that it would be exercising its right to sell the assigned property by public auction - see p. 257 of the record of appeal.

**[6]** The respondent then filed *in personam* civil proceedings at the Kuala Lumpur Sessions Court *vide* Summons No. S3-52-13387-1998 and obtained summary judgment on 9 December 1999. On 17 April 2002, the appellant successfully appealed against the summary judgment.

**[7]** On 12 August 2004, the court, on its own motion, issued the respondent a show cause which led to the KL Sessions Court proceedings being dismissed by the court on its own motion on 27 August 2004.

**[8]** The respondent reacted by taking two courses of action. First, it applied to reinstate the KL Sessions Court proceedings on 10 January 2005. Second, it appealed against the order on 11 January 2005. This appeal was withdrawn the same day that it was filed. Meanwhile, the application to reinstate was dismissed by the Sessions Court on 29 March 2006. So was its appeal against that dismissal. After obtaining leave to appeal against that decision of the High Court on 5 November 2009, the respondent withdrew its appeal at the Court of Appeal on 14 December 2011.

**[9]** Whilst the *in personam* proceedings were underway, the respondent also commenced an *ad rem* action towards exercising its right of sale of the assigned property. A public auction was fixed for 6 November 2006.

**[10]** The auction did not take place because the appellant obtained an *ex parte* injunction on 3 November 2006 - see p. 261 of the record of appeal. This order was made *inter partes* on 4 April 2007.

**[11]** On 6 December 2010, the respondent filed an application under O. 14A of the Rules of the High Court 1980. On 9 March 2011, the court gave the respondent leave to dispose of the property through an auction conducted under the National Land Code (the 2011 order).

**[12]** The respondent then issued a Form 16D notice dated 2 March 2015 under s. 256 of the National Land Code. This is part of the requisite steps that must be taken before any party may approach the court for an order for a judicial sale of charged properties. The appellant did not respond to the notice; neither did the appellant settle the outstanding amount which by the time of proceedings before the High Court stood at RM646,107.80 for the overdraft facilities and RM390,446.53 for the term loan facilities.

**[13]** On 18 October 2016, the respondent filed its originating summons seeking an order for a judicial sale.

**[14]** The appellant objected to the application on the following grounds:

(i) the appellant is not familiar with the terms of the charge as it was never given a copy of the charge documents;

(ii) defective service of the Form 16D - it was served to an address where the appellant no longer resides;

(iii) pursuant to earlier proceedings *vide* S1-22-1092-2006, the respondent had been injuncted from proceeding with a sale of the charged property;

(iv) the application was time barred by virtue of s. 21(1) of the Limitation Act 1953;

(v) application of the doctrine of *res judicata*;

(vi) the respondent lacked *locus standi*.

**[15]** On 20 April 2017, the learned judge granted the order for sale after finding that there was no cause to the contrary established by the appellant. The learned judge agreed with the respondent and rejected all the above objections.

**[16]** At the hearing of this appeal, we understand from learned counsel for the appellant that the main bone of contention rests with the issue of limitation, although the other grounds were by no means, abandoned. The respondent agrees. We have no reason to disagree with the parties and we shall deal with this critical issue first.

**[17]** On the issue of limitation, the arguments are summarised as follows.

**[18]** According to learned counsel for the appellant, s. 21(1) of the Limitation Act 1953 bars the recovery action of the respondent; that the action *in rem* to sell the property arose more than 18 years ago, on 21 May 1998. The fact that the respondent had initiated an auction of the property on 6 November 2006 which though refused by the High Court on 9 March 2011, is acknowledgment that the cause of action had already arisen at that time. When the respondent did not appeal against the refusal of the High Court, the decision of the High Court is therefore final.

**[19]** In response, the respondent focused on the 2011 order, that until that order, the respondent was not able to sell the property. The respondent's inability to sell was all due to the appellant and the orders that it procured from the court. However, with the 2011 order, the respondent issued the 16D notice on 2 March 2015. When the appellant failed to remedy within 14 days from the date of service of the notice, time under s. 21(1) began. The respondent relied on the Court of Appeal decisions in *Peh Lai Huat v. MBF Finance Bhd* [2009] 5 CLJ 69; [2011] 3 MLJ 470 and *Jigarlal K Doshi v. Resolution Alliance Sdn Bhd & Another Appeal* [2012] 1 LNS 811; [2013] 3 MLJ 61. Since the application for a judicial sale was filed in 2016, the application was clearly filed in time and there was therefore no cause to the contrary shown by the appellant.

**[20]** The learned judge agreed with the respondent and applied *Peh Lai Huat* and *Jigarlal K Doshi*.

**[21]** Broadly, both decisions held that the cause of action which is the right to exercise the statutory remedy of an order for sale does not arise until after the chargee has failed to remedy the default specified in the Form 16D notice issued under s. 256 of the National Land Code. The learned judge found that since the appellant had not remedied the default specified in the Form 16D issued on 2 March 2015, the cause of action and thereby the right to foreclose arose at this point. The originating summons filed on 18 October 2016 was consequently found to be valid and filed within time.

**Our Deliberations And Decision**

**[22]** This court has in no less than three decisions departed from the two decisions cited and relied on at the High Court. First, in the case of *Sivadevi Sivalingam v. CIMB Bank Berhad* [2018] 1 LNS 511 (Civil Appeal No: J-02(A)-59-01-2017, later in *Lim Ban Hooi & Anor v. Malayan Banking Bhd* [2018] 6 CLJ 545 (Civil Appeal No: W-02(A)-842-05-2016) and more recently in *Wan Zubaidah Wan Mahmood & Anor v. CIMB Bank Berhad* [2018] 1 LNS 768 (Civil Appeal No: B-02(A)-831-04-2017). In summary, these decisions hold that the 12-year limitation period under s. 21(1) of the Limitation Act 1953 runs from the date when the right to receive the money accrued, and not from the date of default of the 16D notice issued under s. 256 of the National Land Code. The date when the right to receive the money accrued would be the date of breach of the charge or underlying agreement. We will elaborate further on this but for now, on the facts and circumstances in the present appeal we do not find any reason to depart from that view. These are our reasons.

**[23]** First, the uncontroverted fact is that the respondent's right to sell the charged property arose when it recalled the loans after the appellant defaulted in its repayments, thereby terminating the facilities granted under the facility agreement *cum* deed of assignment agreement. This was on 21 May 1998 as seen from the respondent's then solicitors' letter at p. 257 of the record of appeal which *inter alia* stated:

> Following the said recall of the loan, our client hereby instructs us that they intend to exercise their right to sell the assigned property i.e. 3rd Floor, Mayang Plaza, Held under master title grant No. 34366 Lot 18262 Mukim Sungai Buluh, District of Petaling, State of Selangor by public auction pursuant to clause 3.03 of the Deed of Assignment dated 5/9/97.

**[24]** By that same notice, the appellant's licence to occupy the property was "terminated forthwith".

**[25]** This letter captioned "notice to quit and vacate" was issued after the appellant failed to settle the outstanding balance following a notice of demand dated 16 March 1998 that had been issued to the appellant - see p. 253 of the record of appeal. In that earlier notice of demand, the appellant's failure to regularise the account was identified, the amount

outstanding was made known, and the appellant was warned that there were instructions to "recall the said term loan facility and the current account overdraft facility and to also demand, which we hereby do, the settlement of the said sum of RM121,285.20 and RM103,07.70 together with the prescribed interest to our clients or to us as solicitors within 14 days hereof." A

**[26]** In our view, the respondent's letter of 21 May 1998 saw the respondent's solicitors carrying into effect the respondent's instructions after the facilities had been recalled. And, it is only after the facilities have been recalled that the respondent would have a right to enforce the charge. We are of the firm view that the respondent could not have issued a valid letter of demand and a notice to quit and vacate had its right to action not already arisen by this time. It is the failure to repay as promised that gives the respondent the right to demand for monies that it ought to have received from the appellant, and the right to enforce the charge. B C

**[27]** On this date, 21 May 1998, the respondent would have an *in personam* action against the appellant and an *in rem* action against the security of the charged property. The limitation period in respect of the *in personam* action would be six years (s. 6 of the Limitation Act 1953) while the *in rem* action is 12 years (s. 21 of the Limitation Act 1953). The fact that the respondent embarked on the two courses of action, before the KL Sessions Court and then the sale by public auction, attests to this. D E

**[28]** In both circumstances, the limitation period would commence from the date when the cause of action accrued - see the Federal Court's decisions in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, followed in *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207. More specifically, in the case of an action seeking to enforce a charge of land, the time period of twelve years runs from when the right to receive the money accrued. That right would have accrued from the default under the facilities agreement and not from the failure to comply with the notice 16D issued under the National Land Code. By this reasoning, the limitation period of 12 years under s. 21(1) would then set in on 20 May 2010. F G

**[29]** Recognising this position of its rights, and this is necessarily assumed, the respondent proceeded to sell the charged property. A public auction was scheduled for 6 November 2006 but an injunction was issued on 3 November 2006 *vide* KL High Court CS No. S1-22-1092-2006, preventing the auction from taking place until such further order - see p. 261 of the record of appeal. This was also an admitted fact in those proceedings where it was further agreed that by an *inter partes* order of the court granted on 4 April 2007, the injunction was extended until the full trial - see p. 288 of the record of appeal. H

**[30]** On 9 March 2011, the appellant obtained a further order in the same proceedings (KL High Court CS No. S1-22-1092-2006) that the respondent be restrained from disposing the charged property save by an order for a judicial sale under the National Land Code - see p. 266 of the record of appeal. I

**[31]** Meanwhile, strata titles were issued on 1 November 2001 to the developer (Cahaya Kota Development) of the whole property which till that point in time, was held under a master title. On 18 November 2009, the strata title was transferred and registered in the appellant's name - see p. 250 of the record of appeal.

**[32]** Now, s. 21(1) of the Limitation Act which, for the purposes of the present appeal, must be read with s. 21(2) that provides as follows:

> 21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of sale of land
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge of land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.
>
> (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:
>
> Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

**[33]** In *Sivadevi*, applying the Federal Court decision in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 [followed later in *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207], this court decided that pursuant to s. 21(1) of the Limitation Act 1953, time runs from the date when the right to receive the money accrued. That right accrued when the appellant was in breach of the agreement and the charge by defaulting in repayment. As decided by the Federal Court in *Nasri v. Mesah*, "a cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought." The Federal Court further held that " ... 'the right of action accrues' means one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run."

**[34]** That right was therefore dependent on the substantive rights and obligations created pursuant to the contractual arrangements under both the loan agreements and the charge, and not, the 16D notice issued under s. 256 of the National Land Code. From the terms of ss. 21(1) and (2) of the Limitation Act, the relevant date for the purpose of computation of the period of limitation is the date of default in repayment and thereby the corresponding right to receive the money that had accrued, and not, the date of issuance of the Form 16D.

**[35]** This approach was adopted in *Lim Ban Hooi* and later in *Wan Zubaidah Wan Mahmood*. In the latter case, the Court of Appeal agreed and adopted the approach in *Sivadevi* and said:

> [45] More significantly, the latter (i.e. the issuance of a Form 16D under section 256 of the NLC) cannot be utilised interchangeably with the first (i.e. the date when the Bank gives notice to the debtor of a fundamental breach namely default in the repayment of the debt entitling the Bank to recall the entire loan and terminate the loan facility) so as to conclude that time starts to run from the date when the Form 16D was issued for the purposes of computation of the limitation period, as extensively and comprehensively explained by this Court in Sivadevi's case as well as *Lim Ban Hooi and Wong Yoke Wan v. Malayan Banking Berhad* (Civil Appeal No: W02(A)-842-05/2016).
>
> [46] For these reasons, we are of the considered view that the Bank's application for a judicial sale under section 256 of the NLC is caught by limitation under the provisions of section 21(1) of the Limitation Act 1953. As such, the Bank is unable to enforce its charge in view of the fact that more than 12 years have accrued since the date when the default in the repayment of the debt arose in 1987. It is to be noted that the relevant date is the date of default in repayment and not the date of issuance of the Form 16D.
>
> [47] In so concluding, we followed and adopted the reasoning in *Sivadevi*'s case, which, with respect, we concur. It is of considerable importance that the adjectival provision in section 256 of the NLC is not utilised to circumvent the substantive legal provisions of the Limitation Act 1953. It bears repetition that section 256 of the National Land Code serves the specific purpose of providing notice of the chargee's intention to initiate a judicial sale of the charged land to the debtor. It therefore affords the debtor an opportunity to remedy his failure to repay the debt. It does not amount to the actual enforcement of the creditor's substantive legal right. That will only ensue upon the pronouncement and effecting of an order for sale judicially.
>
> [48] By contrast, the provisions of the Limitation Act 1953 in section 21 prescribe substantive legal rights because it provides that the creditor or chargee cannot pursue any right created by a charge over land after the expiry of a period of twelve years. To that extent it statutorily brings to an end the substantive rights of the chargee to recovery of its debt by way of a judicial sale after a period of twelve years from when the debt first became due. This affords 19 finality and certainty to commercial banking law. That right cannot easily be displaced. It ought not to be displaced simply because a creditor chooses to issue a form indicating that it is about to enforce its rights, if such notice comes well after the period statutorily prescribed by Parliament under the Limitation Act 1953, this would amount, in effect, to a circumvention of section 21. That ought not to be countenanced. To do so would be to give a creditor a free rein as to when it chooses to enforce its rights as chargee. This could theoretically ensue for an indeterminate period. Apart from contravening the express provisions of the Limitation Act 1953, it would cause undue prejudice and

A hardship to the debtor, who would be burdened with a far increased sum than that envisaged by the initial loan in view of the levy of interest. And that is precisely the case here, where the initial debt was in the region of RM180,000 and now stands at no less than RM643,000 odd, some 30 years later.

B **[36]** Similarly in the present appeal, the respondent's right to receive the money accrued when the appellant was in default and that would be 21 May 1998. As decided in *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409, at that date, there was clearly in existence a person who can sue (the respondent] and another who C can be sued [the appellant] and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed [the breach and the ensuing right to receive the money accrued).

**[37]** The existence of a cause of action was implicitly acknowledged by the respondent in their solicitors' letter dated 21 May 1998 and by the D respondent's own actions in recalling the facilities and exercising its right to sell the assigned property by way of a public auction. The public auction scheduled for 6 November 2006 was called off pursuant to an order of court on 3 November 2006.

**[38]** We therefore have no hesitation in applying the decisions of this court E reached in *Sivadevi*, *Lim Ban Hooi* and *Wan Zubaidah Wan Mahmood* to the instant appeal.

**[39]** Two questions however, arise for consideration. First, whether by virtue of the various actions of the appellant and the orders granted by the court, is the computation of the twelve year limitation period in any way F affected? Has the period of limitation been postponed or suspended? The second question is whether the fact that the subject property of appellant was held under a master title as opposed to an individual or strata title until 2009, has any bearing whatsoever on the construction of s. 21 of the Limitation Act 1953 and thereby the respondent's right to approach the court for a judicial G sale.

**[40]** The appellant argues that the answer to both question must be in the negative while the respondent obviously contends otherwise.

**[41]** On the first question, we are of the considered view that the period of H limitation is not postponed or suspended by reason of the actions of the appellant or the orders granted by the court. The terms of s. 21 as well as the other provisions in the Limitation Act, do not envisage such postponement or suspension, and it is not the function of the court to read into the legislation words or intentions which are obviously not there.

I **[42]** We observe that the respondent did not appeal against the orders made in KL High Court CS No: S1 -22-1092-2006, or to even set aside such orders. It was open to the respondent to do so, especially with the limitation period still "running". Instead, it was only on 6 December 2010 that the respondent

approached the court with an application filed under O. 14A of the Rules of the High Court 1980 for an order that it be allowed to sell the charged land. On 9 March 2011, the respondent was granted leave to dispose the charged property by a judicial sale under the National Land Code.

**[43]** As already expressed, we are of the view that for the purposes of limitation, time continues to run. The order of the court dated 4 April 2007 injuncting the respondent from proceeding with the order for sale does not suspend the running or computation of the period of limitation. We find justification for the respondent to keep one eye on the limitation clock, so to speak, and the other on any concurrent proceedings. It was incumbent on the respondent, as a vigilant litigant to take active and necessary steps in order to secure for itself the right to diligently proceed to prosecute its claim and seek an order for judicial sale, more so when the period of limitation was expiring.

**[44]** As it is, it was not until 6 December 2010 that the respondent approached the court for an order under O. 14A which was granted on 9 March 2011. By this time, limitation had already set in. It set in almost six months earlier, on 20 May 2010. It is not available to the respondent to use the orders of court for its own inactivity and indolence.

**[45]** As expounded by the Federal Court in *Credit Corporation* (*supra*):

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
>
> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the Courts.

**[46]** Procuring the order of court for a judicial sale on 20 April 2017 does not alter the fact that the order was invalid by reason of time-bar, giving rise to real contrary reasons why the order for sale ought not to have been granted by the High Court. If one looks at the time gaps between the various actions of the respondent towards selling the property, it becomes patently clear that the respondent had taken its time in realising the security. Even after the 2011 order, it was not until 2016 that the respondent proceeded to seek an order for sale.

**[47]** On the second issue of whether the status of the title has only bearing on the respondent's right to enforce the charge, we are of the further view that the answer here is also in the appellant's favour.

**[48]** On 6 March 2018, we had directed the parties to address us on whether there is any difference between property held under a master title and property held under any other title insofar as s. 21 of the Limitation Act is concerned. The respondent had argued that for the purposes of limitation, time can only commence after the individual titles were issued. Since such title was only issued in 2009, and the charge was entered thereafter, time runs only from 2009 in which case, the respondent's action filed in 2016, was not time-barred. We must say that this is actually the respondent's alternative argument to the earlier submission that time runs from the date of the 2011 order.

**[49]** It is our firm view that the status of the title to the charged property does not affect the right of the respondent to apply for an order for sale. The respondent always knew the nature of the title in the property that it was held under a master title and had thus agreed to a security in the form of an assignment. And, it was pursuant to the assignment that the respondent exercised its right to the sale of the assigned property.

**[50]** Section 21(1) further makes no distinction on the character or nature of the title; whether it be master, individual, strata, final or qualified. In fact, s. 21 does not focus on the quality of the title at all. Section 21(1) instead, only makes reference to the security being in the form of either a mortgage or "other charge on land".

**[51]** In any case, where the property is held under a master title, the charge created at the material time is an equitable charge. And, in the Federal Court decision of *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286, the Federal Court was of the view that the words "or other charge on land" in s. 21(1) includes equitable charges and liens.

**[52]** We are therefore in full agreement with the appellant that where the exercise of the right of sale of the property is barred under s. 21(1) of the Limitation Act 1953, the grant of sale by the learned judge is indeed, contrary to "some rule of law or equity". We are amply satisfied that the appellant has shown that granting a sale which is time-barred falls within the three categories of cases that are recognised by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 to amount to "cause to the contrary" within s. 256(3) of the National Land Code.

**[53]** For all these reasons, the appeal must be allowed with costs. The order of the High Court is set aside.